No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

APPELLANTS' PETITION FOR A REHEARING.

LOUIS T. HENGSTLER,
Kohl Building, San Francisco,
Proctor for Appellants and Petitioners.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The undersigned Proctor for appellants considers it his duty, in the interest of plain justice to his clients, to present to this Court the present petition for a rehearing of the cause. He believes that the failure of

his previous efforts to convince the Court that the decree exceeds the fair amount of damages recoverable by appellee by the sum of three thousand two hundred and fifty dollars ($3250), is due to his own shortcomings for which his clients should not be made to suffer, and he therefore earnestly appeals to the Court in the firm conviction that the Court, upon a reconsideration of the admitted facts of this case, will prevent the unjust consequences of the present decree by amending its decision in conformity with the prayer of the petition for a modification.

1. The evidence is:

(a) *Libelant's testimony:*

Mr. Ostrander, libelant and first witness called at the trial, testified on cross-examination:

> "Q. When did the vessel finally get away?
> A. On the 26th of December.
> Q. Not until the 26th of December? What was the cause of all the delay during December?
> A. She was held by the War Trade Board.
> Q. For what reason?
> A. An embargo had been placed on lumber and they would not permit her to sail in this trade.
> Q. So that she could not have sailed before that time without the license and permission of the United States Government?
> * * * * * * *
> A. No, the Government held her" (Ap. pp. 142, 143).

On redirect examination by Mr. Rupp, he testified as follows:

> "Mr. Rupp. * * * As I understand it, she was not allowed to proceed for some time because of the fact that the War Trade Board forbade her to

go to South Africa—would not give her a license to do so. They subsequently did so.

The WITNESS. Finally.

Q. In obtaining the license for her to do so, Hind Rolph & Company co-operated with you in that regard? A. Yes.

Q. When did the War Trade Board first announce a policy, or *put into effect* a policy of requiring licenses for boats to sail to South Africa, if you know?

A. I think it was some time in November.

Q. *Was it prior to November 24th?*

A. *I believe so''* (Ap. p. 145).

It therefore appeared at the beginning of the trial by libelant's personal testimony, that the delay of the vessel during December was caused by act of the Government and, indeed, that any delay subsequent to November 24th was due to the same cause.

(b) *Mr. Rupp's judicial admission:*

Under the circumstances it was eminently proper for the proctor for libelant to withdraw any claim for demurrage in excess of five days after November 24th. And, in fact, immediately after libelant had given this testimony, Mr. Rupp, in open Court and in the presence of the libelant, promptly and expressly withdrew any claim for any time subsequent to five days after November 24th, saying:

> "As a matter of fact, I think the only thing that could be said was that *we* did not get the boat away in time and that was the reason we were held, but *we have not made any claim for that delay. Our claim for delay consists of five days after November 24th,* which five days was consumed in this de-

> bate about the freight and the bill of lading, *but we are making no claim for the subsequent time* that the Government would not allow us to proceed" (Ap. p. 146).

On this delimitation of the issues the hearing of the case went on for four days; libelant called and examined his witnesses; respondents presented and closed their defence, and libelant called and finished the examination of many witnesses in rebuttal. During all this time respondents had relied upon the admission made in open Court by libelant, and the facts thereafter found by the lower Court and by this Court in the original opinion filed, viz, that

> "the demurrage claimed by the appellee was $250 per day for **three** periods; first, from August 25 to October 13, 49 days; second, from October 13 to November 24, 27 days (after deducting 13 lay days); third, for five days after November 24";

and that libelant was claiming no demurrage beyond the "third" period.

2. The "Decision" of the lower Court contains the following statements of libelant's claims:

> (a) "Libelant, as the owner, seeks to recover from the respondents $19,000 for demurrage for delay in furnishing cargo to the S. S. 'Levi W. Ostrander', *and the further sum of $1250 for five days' additional detention of said vessel.*"
>
> (b) "It is contended that the vessel could have completed loading in 13 working days, but that the respondents failed to furnish cargo to the vessel, so it was not finally loaded until November 24th; *that by the refusal of the respondents to pay demurrage the vessel was delayed five additional days.*"

There is not a word here of any "fourth" period, involving delay during December. As late as June 25, 1919,—four months after the trial—the lower Court therefore understood and stated in the opinion filed that the claim of libelant covered delay in furnishing cargo, down to November 24th, *plus* **five** *additional days.*

Nevertheless, when, on September 17, 1919, the decree was signed and filed in Seattle, the lower Court, instead of *five* additional days after November 24th or down to November 30th, awarded demurrage for **eighteen** additional days, or down to December 14th.

3. This was clear error and called loudly for a remedy. Respondents appealed to this Court from the whole decree, but emphasized the argument on periods "first", "second" and "third". The point involved in the "fourth" period is so obvious that a proper reference to the facts would seem sufficient to dispose of it inevitably; but we fear that our emphasis on the other points caused a corresponding failure to properly call the attention of the Court, in the first place, to this error, and that this defect in our argument is responsible for the fact that this Court has not adverted to this point in its opinion at all, and has probably entirely overlooked it.

4. After the decision of this Court was filed, and in response to our petition for a modification thereof, the Court has now modified its original findings of fact by adding to the three claims upon which the trial proceeded, a "fourth" claim, viz:

> "Fourth, for each day's detention after November 30, the date of filing the libel",

and has awarded to appellee, for demurrage during this "fourth" period, the sum of $3250.

It is respectfully submitted that the error in modifying the original finding of fact by making four claims out of libelant's three, is more grievous than was the error in decreeing the excessive demurrage on the original, correct finding that appellee has a claim for the three periods only.

5. The record shows Mr. Ropp's express withdrawal of this alleged "fourth" claim in only one place; but the attention of the Court is called to the fact that, at the end of the trial when Mr. Rupp attempted to repudiate his withdrawal, I said to the lower Court, in connection with my objection to the attempted repudiation:

> "I think Mr. Rupp stated half a dozen times that he did not ask for any more than five days of demurrage, and when I went into some of the facts, he said expressly that it was not necessary to do so, and that was the impression I got, that it was not necessary to do so, because he did not claim any demurrage during that period" (Ap. p. 417).

This statement was made in open Court and was not challenged. Although the record does not show it otherwise than indirectly by this final episode at the trial, Mr. Rupp did make the identical admission several times in the course of the trial.

6. Respondents made their defence in accordance with Counsel's express tender of the issues, viz: upon

claims for three periods and no more. Libelant himself having testified that any delay during December was not caused by respondents, it was eminently fair for his counsel to eliminate any issue of demurrage beyond November 30th by informing the Court, in the presence of libelant, that he made no claim such as this Court has now added as "fourth".

In writing its opinion in the original form, this Court must have been impressed with the propriety of this proceeding and the fact that the claim of libelant terminated on November 30; for the law is clearly that Mr. Rupp had a right to bind his clients by defining the amount due on the claim (Wilson v. Spring, 64 Ill. 14); to dismiss the action—if he had any—for damages beyond November 30 (McLaren v. McNamara, 55 Cal. 508); to stipulate as to the issues to be tried (J. L. Roper Lumber Co. v. Lumber Co., 49 S. E. 946); to waive a part of the relief which he might otherwise claim (Hoyt v. Gelson, 13 Johns 141); and on the other hand, I had a right to rely upon Mr. Rupp's admission made in the presence of the Court and his client, and to confine the defence of the action to the period ending with November 30th.

When admissions of this character are formally made, they are conclusive upon the client, and (particularly when as here, made in the presence of the client in open Court) cannot be withdrawn.

> "In the trial of a cause the admissions of Counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise

> be called. They may limit the demand made * * *. Indeed, any fact, bearing upon the issues involved admitted by counsel, may be the ground of the Court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the Court may * * * act upon it and close the case."
>
> Oscanyan v. Arms Co., 103 U. S. 261, *263*.

Here the case for any demurrage beyond November 30th was closed on the first day of the trial.

> "It would operate as a fraud upon the adverse party, if, after he had been thus induced to withhold necessary proofs, he should be compelled to prove the facts which had been admitted, or to submit to defeat."
>
> Jones on Evidence, Section 257.

When Mr. Rupp, during the last moments of the trial, after having at the beginning defined the issues and eliminated any "fourth" claim, surprised respondents by attempting to retract his judicial admission, the grounds of my objection were that,

> "when I went into some of the facts, he said expressly that it was not necessary to do so * * * because he did not claim any demurrage during that period. For that reason, in one or two instances, I desisted from going on with further testimony during that period, because I relied on the fact that five days was all that was claimed under the libel" (Ap. p. 417).

It is respectfully submitted that libelant was estopped from making a retraction of his admissions after respondents had relied upon them in presenting their de-

fence to the Court. In our opinion the Court itself would not then have had the power to give him leave to withdraw his admission; at any rate, no such leave was in fact granted. The libelant, the respondents and the Court were and are bound by the issues solemnly defined.

7. For the reasons stated I am constrained by my duty to my clients to insist respectfully and earnestly that the addition to the former opinion of this Court of a claim "fourth, for each day's detention after November 30, the date of filing the libel", is contrary to the admitted facts. The statement in the original opinion, that "the demurrage claimed by the appellee was $250 per day for **three** periods" is correct; the amended statement that the demurrage claimed by the appellee was "for **four** periods" is erroneous. The demands of justice in this case do not require a change in the facts; they require that the Court should award demurrage to libelant in accordance with the issues limited by libelant himself, and properly defined in the original opinion of the Court below and in the findings of this Court. Any other action would permit a legal fraud upon respondents who were not required to make, but were precluded from making a defence to the alleged "fourth" claim for 13 days.

8. I have an abiding confidence that this Court, after reconsideration of the matters here urged, will relieve respondents from the obligation to pay damages for the 13 days in question. But if the Court should decide that

the award for these 13 days demurrage shall stand, then and in that event the Court is respectfully requested to vouchsafe a finding as to the cause of the delay during the 13 days in question, for the following reasons: The record certainly shows that respondents personally were in no wise at fault in the entire transaction, but that others, viz., the Douglas Fir Exploitation & Transport Company, or The Puget Sound Mills & Timber Company, or the Charles Nelson Company, are the parties who should be ultimately responsible to respondents for any damages which they may be required to pay to libelant for demurrage. Respondents, however, have no means of attaching the responsibility for the 13 days to the proper party, unless the Court—if respondents' petition be denied—advise the parties to this action of the definite ground upon which the decision referring to the alleged "fourth" period is based.

Dated, San Francisco,
September 7, 1920.

Respectfully submitted,

Louis T. Hengstler,
Proctor for Appellants and Petitioners.

Certificate of Counsel.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is

well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 7, 1920.

Louis T. Hengstler,
Counsel for Appellants and Petitioners.